No. 848

APR 5 1944

Supreme Court of the United States

LYNBROOK GARDENS, INC.,

Petitioner,

against

BERNARD C. ULLMANN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

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TO THE HONORABLE THE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA AND THE HONORABLE ASSOCIATE JUSTICES THEREOF:

Your petitioner, LYNBROOK GARDENS, INC., respectfully submits this petition for a writ of certiorari directed to the Supreme Court of the State of New York, Nassau County, to review the decision and order of the New York Court of Appeals in the above cause reversing the order of the Appellate Division of the Supreme Court of the State of New York, Second Department, and dismissing the complaint, the Appellate Division in turn having affirmed a judgment and order of the Supreme Court of the State of New York, Nassau County, granting judgment on the pleadings for the petitioner (the plaintiff below) on one cause of action for specific performance of a contract for the sale of real property and for the respondent (the defendant below) upon a second cause of action of a similar nature.

The Court of Appeals decided this cause on December 8, 1943. Its decision was final. An order and judgment was entered in the office of the Clerk of Nassau County

on March 29, 1944, upon the remittitur of the Court of Appeals making the order and judgment of the Court of Appeals the order and judgment of the Supreme Court.

By order of Mr. Justice Jackson, dated March 3, 1944, petitioner's time to apply for a writ of certiorari was extended to and including April 6, 1944.

Opinions Below

An opinion was written by the Justice of the Supreme Court who heard the motion for judgment on the pleadings (R. 192). The Appellate Division unanimously affirmed the judgment of the Supreme Court, without opinion, other than a brief memorandum (R. 211). The Court of Appeals reversed, 6 to 1, the order of the Appellate Division, and dismissed the complaint. Chief Judge Lehman wrote an opinion in which four associate Judges concurred (R. 216). Judge Desmond wrote a dissenting opinion (R. 219). Judge Thatcher concurred in the result reached by the majority of the Court, but did not write a separate opinion. The majority and dissenting opinions are reported in 291 N. Y. at 472.

Jurisdiction

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. 344(b)).

Question Presented

The New York Court of Appeals declared that a substantial doubt exists with respect to the constitutionality of Article VII-A of Title 3 of the Tax Law of the State of New York, commonly called "the *in rem* tax lien foreclosure law" (N. Y. L. 1939, Ch. 692, effective October 1, 1939) under the Federal Constitution, and accordingly dis-

missed the complaint seeking specific performance of a contract for the sale of real property title to which depended upon the constitutionality of this statute.

The only question involved is:

1. Do the provisions of the *in rem* tax lien foreclosure law, which cut off the rights of on who receives no actual notice, constitute due process of law?

Statement

There are thousands of parcels of real estate in New York State upon which real estate taxes have been permitted to remain unpaid for a long period of years. In many instances the arrears of taxes exceed the present fair market value of the property. The reason that taxing districts have permitted this situation to arise is that the old method of foreclosing tax liens was too expensive. To remedy the evil, the New York legislature adopted Title 3 of Article VII-A of the New York Tax Law.

This cause arose as follows:

The petitioner agreed to sell and the respondent agreed to buy two parcels of property, the title to which came through a proceeding instituted by the Village of Lynbrook for foreclosure of tax liens by action *in rem* under Article VII-A.

Substantially, the parties agreed that the respondent need not take title as to one parcel unless the title was of such a character that it would be good even though it should at some time transpire that an infant, incompetent, absentee or non-resident had had an interest in the property and had received no actual notice of the *in rem* proceeding, and, as to the second parcel, unless the title would be good even though it should transpire not only that such an interested party had received no actual notice, but also that the taxes on which the *in rem* foreclosure

proceedings were based had actually been paid instead of being unpaid. The petitioner tendered deeds of the property and the respondent rejected them on the ground that while the statute purported to vest such a title in the petitioner, it was ineffective to do so because of its unconstitutionality under the due process provisions of the State and Federal Constitutions.

Petitioner brought an action setting forth the agreements and the tender and refusal, and demanded specific performance. The respondent filed an answer admitting all of the allegations of the complaint, and moved for judgment on the pleadings on the ground that the provisions of the *in rem* foreclosure act (Article VII-A of the Tax Law) were unconstitutional.

A Special Term of the Supreme Court held the statute constitutional in so far as it purported to cut off the interests of the persons who had received no actual notice of the *in rem* proceedings, but held that the statute should not be construed as purporting to have that effect in a case where the taxes upon which the municipality attempted to base the *in rem* proceedings had been paid (Opinion of Hon. Peter M. Daly, J., R. 192). The result was that judgment for specific performance was given for the petitioner on the first cause of action and that judgment was given for the respondent dismissing the complaint on the second cause of action (R. 5). The Appellate Division unanimously affirmed this result (R. 206, 208). It appears, however, from the memorandum of the Appellate Division's decision that the Court may have been of the opinion that the statute did purport to cut off the interests of persons who had received no actual notice even though the taxes had been paid but considered the statute unconstitutional in so far as it purported to have this effect. (Memorandum of Appellate Division's decision, R. 211, wherein it is stated that "Carswell, J.

concurs as to first cause of action and likewise concurs as to invalidity of statute referred to in second cause of action, but as to latter deems that there is no aggrieved owner or suitor before the court entitled to have a ruling as to the constitutionality of that statute.") The Court of Appeals reversed the decision of the Appellate Division and dismissed the complaint. The majority of the Court said that a substantial question was presented as to the constitutionality of the statute under the Federal Constitution, and since the Court of Appeals could not finally determine this question, it would not order specific performance.

Specifications of Error

The Court below erred:

1. In holding that there was a substantial question as to the constitutionality of Article VII-A under the Federal Constitution.

2. In holding, in substance and effect, that Article VII-A of the Tax Law of the State of New York was unconstitutional under the Federal Constitution.

Reasons Relied on for the Allowance of the Writ

1. ***The Decision of the New York Court of Appeals was Based Entirely Upon a Federal Question, i.e., the Supposed Doubt as to the Constitutionality of the Statute Under the Federal Constitution.***

The Court of Appeals accepted the principle that a party who has contracted to purchase real estate cannot avoid his obligation when the doubt as to the title can be removed by the decision of the Court in the specific performance action (R. 218). It refused to order specific performance solely because its decision would not finally

determine the constitutionality of the statute under the Federal Constitution.

In the opinion concurred in by the majority of the Court Judge Lehman said (our R. 218):

> "In this case, however, the courts of this State cannot authoritatively determine the questions of law which create serious doubt as to the validity of the statute by virtue of which the seller has acquired title and no decree of specific performance can give to the buyer assurance that the title transferred to him will not be successfully challenged thereafter."

The only question of law which the Court of Appeals thought it could not finally determine was the constitutionality of the statute under the Federal Constitution. This appears from the majority opinion (R. 218):

> "This court can authoritatively determine whether or not the statute violates the provisions of the Constitution of the State of New York; only the Supreme Court of the United States can ultimately determine whether the statute violates the provisions of the Constitution of the United States. Even though this court were to sustain the validity of the statute, the Supreme Court of the United States might still reach a different conclusion."

The decision of the Court of Appeals that there is a substantial doubt as to the constitutionality of the statute will, of course, be final so far as your petitioner is concerned unless this Court grants certiorari.

Moreover, the pronouncement of the highest court of the State of New York that the constitutionality of the statute presents a substantial question will be sufficient to deter tax districts from using it. If the statute is not used, its constitutionality can never be determined. The effort of the New York Legislature to correct a serious evil will have been nullified without a real consideration of the validity of its enactment.

The fact that the Court of Appeals did not in words say that the statute was unconstitutional does not prevent a review by this Court.

In Robertson and Kirkham's "Jurisdiction of the Supreme Court of the United States", 1936, it is stated at chapter 11, section 61, page 109:

> "Actual decision of the federal question in terms by the state court is not required; it is sufficient that the federal question was fairly presented by the record, was necessary to a determination of the cause, and that no adequate nonfederal ground of decision appears."

The foregoing summary of the rule is amply justified by the decisions of this court.

> *Lawrence* v. *State Tax Commission*, 286 U. S. 276;
> *Ward* v. *Love County*, 253 U. S. 17;
> *Minnesota* v. *National Tea Co.*, 309 U. S. 551.

In the *National Tea Co.* case, *supra*, Mr. Justice Douglas said, at page 557:

> "It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action."

2. *The Constitutionality of the Statute.*

Notwithstanding the majority opinion of the Court of Appeals, we respectfully submit that there is no substantial doubt about the constitutionality of the statute under the decisions of this Court.

> *Winona & St. Peter Land Company* v. *Minnesota*, 159 U. S. 526;
> *Leigh* v. *Green*, 193 U. S. 79.

An examination of the statute will show that the proceeding which it prescribes constitutes due process under the foregoing authorities.

(a) The Statute

The statute permits a tax district voluntarily to adopt the provisions of Title 3 of Article VII-A (Tax Law, Sec. 162). Once Title 3 has been adopted "Whenever it shall appear that a tax district owns a tax lien which has been due and unpaid for a period of at least four years from the date on which the tax assessment or other legal charges represented thereby became a lien, such tax lien shall be summarily foreclosed by the tax district in the manner provided in this title, * * *" (Tax Law, Sec. 165).

First a list must be filed in the County Clerk's office setting forth brief descriptions of the parcels where the liens are to be foreclosed, the names of the last known owners as they appeared on the assessment roll and the amount of each tax lien upon each parcel. Copies are filed in the office of the collector and attorney for the taxing district. The filing of this list constitutes under the terms of the statute the commencement of an action to foreclose the tax liens therein described (Tax Law, Sec. 165-a, subd. [1]). The list filed by the Village of Lynbrook for the year 1940, through which the titles here involved are derived, appears on pages 22 to 51 of the record.

Every person having any right, title or interest in or lien upon any parcel described in such list may redeem it or may serve an answer setting forth any defense or objections. In the event of his failure to do so, he shall be barred and forever foreclosed of all his right, title and interest in and to the parcels described in the list and a judgment in foreclosure may be taken (Tax Law, Sec. 165-a, subd. [2]).

To give persons interested notice of the foreclosure proceedings a notice must be published at least once a week for six successive weeks in two newspapers in the tax district. This notice tells of the filing of the list and contains an express warning that such filing constitutes the commencement of an action to foreclose the tax lien and that persons having an interest may redeem or answer within a period therein named. The notice states that in the event of the failure to redeem or answer the person interested shall be forever barred and foreclosed of all his right, title, interest and equity of redemption and that a judgment in foreclosure may be taken. This notice must also be posted in three conspicuous places and mailed to the last known address of each owner of property affected thereby as the same appears upon the records in the office of the collecting officer. The copies of the notices mailed must bear a further notice to the addressee advising him that he is the presumptive owner or lienor of one or more of the parcels mentioned and that unless the taxes are paid or an answer interposed the ownership of the property will in due course pass to the taxing district (Tax Law, Sec. 165-b).

If no answer is interposed, the court must make a final judgment awarding the tax district the possession of the parcel concerned with a direction to the collecting officer to execute a deed to the tax district conveying to it full and complete title (Tax Law, Sec. 165-h, subd. [6]). The statute continues as follows:

> "Upon the execution of such deed, the tax district shall be seized of an estate in fee simple absolute in such land and all persons, including the state of New York, infants, incompetents, absentees and non-residents who may have had any right, title, interest, claim, lien or equity of redemption in or upon such lands shall be barred and forever foreclosed of all such right, title, interest, claim, lien or equity of redemption."

The statute also provides that where as to any parcel an answer has been interposed by another tax district, the tax districts may by agreement between themselves provide for a conveyance without sale of such parcel to one of such tax districts free and clear of any right, title or interest, and in such event the title thus vested is of the same character as though no answer had been filed (Tax Law, Sec. 165-h, subds. [3] and [5]).

No claim has been made at any stage in this litigation that the tax district did not comply with the procedure provided in the statute. The record shows that it did.

(b) The *In Rem* Proceeding as due process of law

Except in admiralty cases, American courts have always held that some kind of notice to those interested in the property is necessary even in an *in rem* proceeding in order that the constitutional requirements of due process of law might be fulfilled. The commonest form of giving such notice is publication of the procedure in a newspaper, often combined with posting in public places and mailing to the last known address of the defendant.

In 1878 Minnesota adopted an *in rem* tax lien foreclosure statute which provided for filing a list of delinquent taxes, publication of the list and a decree of court foreclosing the rights of all interested parties who did not appear. This statute was sustained in *Winona & St. Peter Land Company* v. *Minnesota*, 159 U. S. 526. It differed from the New York statute now under consideration in only two substantial respects: (1) the Minnesota statute required publication of the whole list, while our statute requires only a publication of the notice that the list has been filed; (2) the Minnesota statute required a foreclosure sale, while ours permits a taxing district in event of default to take over the property.

In *Leigh* v. *Green*, 193 U. S. 79, this Court upheld a statute so similar to the one at bar that the case is almost

completely controlling. In that case a Nebraska statute provided for the publication of a description of the property on which taxes were delinquent and a decree of the court foreclosing the rights of all interested parties who did not appear. A publication describing the property named the wrong owner so that the rightful owner had no notice of the foreclosure but the title of the purchaser in the foreclosure sale was upheld against the rightful owner who had thus been deprived of notice.

The Nebraska statute differed from the New York statute in but two respects: (1) it provided for the publication of the description of the property instead of merely a notice that the description had been filed as in the case at bar, and (2) it provided for a sale of the property instead of a conveyance to the taxing district. Neither of these differences is determinative.

Neither the publication of the description nor even of the notice is required by due process of law as there has been the equivalent of public posting by filing the list in the County Clerk's office. The publication is required out of solicitude for the landowner rather than to meet the necessities of the law.

Nor does the fact that the property is simply conveyed to the taxing district instead of being put through the form of a sale render the statute unconstitutional. The notice which is posted and published apprises the landowner that if he does not answer he will be foreclosed of all interest in the property. If the state can by posting and publication obtain jurisdiction over a man for the purpose of selling his property under a statute which provides sale as a method of foreclosure, it can certainly obtain jurisdiction over him in the same way for the purposes of taking title to his property under a statute which provides for taking title as a method of foreclosure. Indeed, the *strict* foreclosure which the *in rem* tax lien en-

forcement statute adopts (as opposed to foreclosure by sale) was, in England, the only way of enforcing a mortgage (*Bolles* v. *Duff*, 43 N. Y. 469, 474). Though recognized as a severe remedy, strict foreclosure is so deeply embedded in our law that it must be "due process". The important thing, however, is that jurisdiction is obtained over the land and that notice given to the landowner is sufficient. Once there is jurisdiction and valid notice, the course of proceedings thereafter is immaterial so long as carried on as prescribed by law.

3. *A Question of Public Importance is Involved.*

The purpose of the *in rem* tax foreclosure statute is to permit taxing districts to get areas blighted by tax arrears back into the tax-paying class at a minimum of expense. A notorious example of such an area in New York State is what is known as the soap-box lot section of the Town of Bedford, Westchester County. The Larkin Soap Company of Buffalo owned a tract of wild land there, and in the eighties divided it up on paper in 100-foot lots, and gave away a deed to a lot with every box of soap sold. Taxes were never paid by the soap buyers, and there is no possibility that any of the hundreds of scattered owners would be willing to pay the accrued taxes to get the property and yet their theoretical right to do so prevents the Town of Bedford, which is the real owner of the land, from giving a clear title to it without hundreds of expensive tax foreclosure proceedings. While the soap-box lot section is an extreme example, there are numerous areas throughout the State where parcels of real estate are so far under water because of tax arrears that they are not available for any useful purpose. The public importance of the question presented in this litigation is indicated by the fact that in the New York courts the following tax districts appeared as *amici curiae*, seeking to uphold the statute:

Counties of: Chautauqua, Chemung, Erie, Orange and Steuben.

Town of: New Castle.

Cities of: Amsterdam, Auburn, Batavia, Buffalo, Dunkirk, Elmira, Glens Falls, Jamestown, Lackawanna, Newburgh, New Rochelle, Rochester, Schenectady, Utica and Yonkers.

Villages: of: Blasdell, Cedarhurst, East Rockaway, Floral Park, Freeport, Garden City, Hempstead, Johnson City, Lynbrook, Malone, Mamaroneck and Valley Stream.

Anne M. Leach, a property owner in the Village of Lynbrook also appeared as *amicus curiae* and attacked the constitutionality of the statute throughout the litigation in the New York courts.

We respectfully urge that the Court of Appeals erred in not holding that the statute was constitutional under the Federal Constitution;that this court should grant certiorari and should reverse the judgment of the Court of Appeals dismissing the complaint and remand the case to the Court of Appeals so that it may pass on the constitutionality of the statute under the State Constitution.

CONCLUSION

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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